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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 650.

R. C. TWAY COAL COMPANY,
R. C. TWAY, President and Director of R. C. Tway Coal Company, and
L. A. SHAFER, Director of R. C. Tway Coal Company, - - - - - - - - - - Petitioners,

versus

C. H. CLARK, - - - - - - - Respondent.

BRIEF FOR RESPONDENT.

FOR RESPONDENT: JOSEPH SELLIGMAN,
Marion E. Taylor Building,
Louisville, Kentucky.

SELLIGMAN, GOLDSMITH, EVERHART & GREENEBAUM,
Marion E. Taylor Building,
Louisville, Kentucky,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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Supreme Court of the United States

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No. 650.

R. C. TWAY COAL COMPANY,
R. C. TWAY, PRESIDENT AND DIRECTOR OF R. C. TWAY COAL COMPANY,
L. A. SHAFER, DIRECTOR OF R. C. TWAY COAL COMPANY, - - - - - - - - - *Petitioners,*

versus

C. H. CLARK, - - - - - - - - - *Respondent.*

BRIEF FOR RESPONDENT.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States District Court for the Western District of Kentucky (R. 115-157), which is herein reviewed, is reported in 12 Fed. Supp. 570.

II.

JURISDICTION.

The decree of the United States District Court for the Western District of Kentucky was entered November 14, 1935 (R. 161-163). An appeal to the

United States Circuit Court of Appeals for the Sixth Circuit was allowed November 22, 1935 (R. 169), and the transcript of the record was filed in that Court on December 19, 1935. On December 20, 1935, and before the case was heard or submitted in the Circuit Court of Appeals, a petition for a writ of certiorari was filed in this Court and on December 23, 1935, certiorari was granted, 296 U. S. XVI, as authorized by Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Section 347, Title 28, U. S. C. A.).

The case involves the constitutionality of the Bituminous Coal Conservation Act of 1935 approved August 30, 1935 (Section 801, *et seq.*, Title 15, U. S. C. A.; 49 Stat. 991; Public No. 402, 74th Congress), the lower Court having held the Act constitutional in its entirety.

III.

BITUMINOUS COAL CONSERVATION ACT.

The Bituminous Coal Conservation Act is copied in full in the appendix to the brief of the petitioners herein, making it unnecessary again to copy it herein.

IV.

STATEMENT OF THE CASE.

The facts of the case as presented to the District Court, including the resumé of the pleadings, a review of the evidence therein presented, and of the rulings

of the District Court, are correctly set forth in the brief of the petitioners, pages 11-20, inclusive.

The questions herein involved, insofar as they relate to the constitutionality of the Bituminous Coal Conservation Act, are identical with the questions involved in the companion cases of—

Carter v. *Carter Coal Company, et al.*, No. 636, October Term, 1935, and

R. C. Tway Coal Company, et al., v. *Selden R. Glenn, Collector, etc.*, No. 649, October Term, 1935,

which are set for argument with this case. The last mentioned case was heard by the Judge of the District Court for the Western District of Kentucky at the same time as was this present case, and the opinion of the Judge of that Court hereinabove referred to related both to the case against the Collector and this present case.

While this case was pending in the District Court and before it had made any substantial advance toward a hearing, counsel for respondent (the plaintiff) invited the legal representatives of the United States to participate in the preparation of the plaintiff's case against the defendant (R., pp. 13-16), which invitation was not accepted. This invitation was made a part of the record herein (R., p. 17). Though declining the invitation, counsel for the Government filed (R., p. 17) a brief "Amicus Curiae" questioning the jurisdiction of the District Court to hear and determine the constitutionality of the Bituminous Coal Conservation Act in this proceeding, upon the grounds,

broadly stated, that the action by the respondent herein, as a stockholder, against the petitioner (defendant), was a collusive action and did not present a genuine or justiciable controversy. Since, in this present hearing before the Supreme Court of the United States, the legal representatives of the United States Government, either in this case or in the companion cases to be heard herewith, will present, undoubtedly with vigor and competency, the contentions of the Government that the Act in question is constitutional, as counsel for the respondent herein we deem it unnecessary to supplement what counsel for the Government will have to say on that question. We shall, therefore, present to this Court only such reasons and authorities as in our view tend to sustain the right of the respondent to maintain and have decided the action which he brought in the District Court.

V.

ARGUMENT.

In discussing the right of the plaintiff to maintain this action, our argument will fall under two main heads:

1. THE CASE PRESENTS A GENUINE CONTROVERSY BETWEEN THE PLAINTIFF AND THE DEFENDANT UPON A JUSTICIABLE MATTER OF WHICH THE FEDERAL COURTS WILL TAKE COGNIZANCE.

2. THE ACTION HAS NOT BEEN BROUGHT PREMATURELY.

We will now take up these subjects in the order indicated.

1. The Case Presents a Genuine Controversy Between the Plaintiff and the Defendant Upon a Justiciable Matter of Which the Federal Courts Will Take Cognizance.

First we will show that actions of this kind wherein a stockholder has sought to restrain directors and officers of a corporation from actions injurious to the corporation and to the stockholder's interest, have been held proper subjects of jurisdiction by Federal Courts, either on the basis of diversity of citizenship or of the involvement of a question under Federal law or the Federal Constitution.

Dodge v. *Woolsey,*
18 Howard, 331,

was a stockholder's suit against the officers and directors of a bank and the tax collector to enjoin collection and payment of an illegal tax. Action held maintainable.

Brushaber v. *Union Pacific Railroad,*
240 U. S. 1.

"The maintenance by a stockholder of a suit to restrain a corporation from voluntarily complying with the income tax provisions of the Tariff Act of October 3, 1913, upon the grounds of the repugnancy of the Statute to the Federal Constitution, of the peculiar relation of the corporation

to the stockholders, and their particular interests resulting from many of the administrative provisions of the assailed Act, of the confusion, wrong, and multiplicity of suits, and the absence of all means of redress, which will result if the corporation pays the tax and complies with the Act in other respects without protest, as it is alleged it is its intention to do, is not forbidden by the prohibition of U. S. Revised Statutes, Sec. 3224, against enjoining the enforcement of taxes."

Pollock v. *Farmers Loan & Trust Company,*
157 U. S. 429, 39 L. Ed. 759.

Mr. Chief Justice Fuller delivered the opinion of the Court:

"The jurisdiction of a Court of Equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained. Dodge v. Woolsey, 59 U. S. (18 How.) 331, 15 L. Ed. 401; Hawes v. Contra Costa Water Company, 104 U. S. 450, 26 L. Ed. 827.

"As in Dodge v. Woolsey, this bill proceeds on the ground that the defendants would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of, and paying, an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury.

"The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and, so far as it was within the

power of the Government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. The relief sought was in respect of voluntary action by the defendant company and not in respect of the assessment and collection themselves. Under these circumstances we should not be justified in declining to proceed to judgment upon the merits."

In—

Smith v. *Kansas City Title & Trust Company*, 255 U. S. 180,

a bill was filed by a stockholder to enjoin the corporation from investing the funds of such corporation in farm loan bonds issued under the authority of the Federal Farm Loan Act of July 17, 1916, as amended by the Act of January 18, 1918, on the ground that those Acts were beyond the constitutional power of Congress and that the securities issued thereunder were consequently of no validity. It was held that the bill set forth a cause of action arising under the Federal Constitution or laws of which a Federal Court has jurisdiction under Judicial Code, Sec. 24, without diversity of citizenship. While no objection to the jurisdiction appears to have been raised by any of the litigants, the question does seem to have been raised by two of the Justices, to-wit: Mr. Justice Holmes and Mr. Justice McReynolds, who dissent upon the ground that the question did not arise under the Constitution or laws of the United States, for the reason that in their view the regulation of the investments to be made by Kansas City Title & Trust Company, a cor-

poration organized under the laws of the State of Missouri, rested upon the interpretation of State laws, and, therefore, unless there be diversity of citizenship to give jurisdiction, none was vested in the Federal courts. Possibly because the question was raised by these two Justices, the Court discusses the matter. On this subject, the opinion of the Court by Mr. Justice Day reads in part as follows:

> "No objection is made to the Federal jurisdiction, either original or appellate, by the parties to this suit, but that question will be first examined. The company is authorized to invest its funds in legal securities only. The attack upon the proposed investment in the bonds described is because of the alleged unconstitutionality of the acts of Congress undertaking to organize the banks and authorize the issue of the bonds. * * * As diversity of citizenship is lacking, the jurisdiction of the district court depends upon whether the cause of action set forth arises under the Constitution or laws of the United States. Judicial Code, §24.
>
> "The general rule is that, where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such Federal claim is not merely colorable, and rests upon a reasonable foundation, the district court has jurisdiction under this provision."

The Court then proceeds to review various decisions dealing with this question and concludes as follows:

"The jurisdiction of this court is to be determined upon the principles laid down in the cases referred to. In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional, and the bonds valid and desirable investments. The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is, therefore, apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue.

"The general allegations as to the interest of the shareholder, and his right to have an injunction to prevent the purchase of the alleged unconstitutional securities by misapplication of the funds of the corporation, give jurisdiction under the principles settled in Pollock v. Farmers' Loan & T. Co. and Brushaber v. Union P. R. Co., *supra.* We are, therefore, of the opinion that the district court had jurisdiction under the averments of the bill, and that a direct appeal to this court upon constitutional grounds is authorized."

* * * * * * *

The following cases address themselves more directly to the question of supposed collusion or identity of interest between the parties litigant, and claims or charges of fraud upon the jurisdiction of the Court.

In the Matter of Reisenberg, 208 U. S. 90.

The facts in this case may be stated most briefly in the language found in the first headnote of the case,

as prepared in 52 Lawyers Edition, page 403, reporting this case, and, in the statement of facts by the Court.

> "1. A suit by Pennsylvania and New Jersey corporations against a New York Corporation operating a street railway system in the city of New York, the bill in which avers an unsatisfied indebtedness due each complainant from the defendant, substantially involves a controversy between citizens of different states within the meaning of the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, pp. 507, 508), §1, defining the jurisdiction of the Federal Circuit courts, although the defendant admits the indebtedness and the other allegations of the bill, and joins with the complainants in a request that receivers be appointed."

We also quote in part from the statement of facts by Mr. Justice Peckham:

> "Upon the filing of this bill a subpoena was duly issued and served upon the defendant, the New York City Railway Company, and an answer was put in by that company, which admitted all the allegations of the bill, and it joined in the prayer of the bill that the court should take possession, by receiver, of the system of railroads operated by the defendant, and that the receiver should, after taking possession of the entire property, preserve, manage, operate and control the same, and should pay all the indebtedness due or to become due, and otherwise discharge all the duties imposed by courts upon receivers in similar cases.

"Upon this bill and answer an application was made to the circuit judge for the appointment of a receiver, and such application was granted, and receivers were duly appointed, with directions to operate the road."

* * * * * * *

"In October, 1907, an application was made to the circuit court on the part of those who are now petitioners in this court, in which application it was alleged that the bill of complaint in the above mentioned suit, and the answer consenting to the appointment of receivers, and admitting the allegations in the bill, were filed collusively for the purpose of avoiding the jurisdiction of the courts of the state, and for the purpose of creating a case cognizable under the judiciary act of the United States by the United States courts. And it was averred that the suit in which the bill and answer were filed did not and does not really and substantially involve any dispute between the parties, nor did it involve any real or substantial controversy between them, or any dispute between them which was within the jurisdiction of the court."

Justice Peckham, delivering the opinion of the Court, said in part:

"Although the amount involved in the suit in the circuit court was sufficient, it is insisted now that there was no dispute or controversy in that case within the meaning of the statute, because the defendant admitted the indebtedness and the other allegations of the bill of complaint, and consented to and united in the application from the appointment of receivers. Notwithstanding this

objection, we think there was such a controversy between these parties as is contemplated by the statute. In the bill filed there was the allegation that a demand of payment of a debt due each of complainants had been made and refused. This was not denied and has not been. There was therefore an unsatisfied demand made by complainants and refused by defendants at the time of the filing of the bill. We think that where there is a justifiable claim of some right made by a citizen of one state against a citizen of another state, involving an amount equal to the amount named in the statute, which claim is not satisfied by the party against whom it is made, there is a controversy, or dispute, between the parties, within the meaning of the statute. It is not necessary that the defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it. It might be that he could not truthfully dispute it, and yet, if from inability, or, mayhap, from indisposition, he fails to satisfy it, it cannot be that because the claim is not controverted the Federal Court has no jurisdiction of an action brought to enforce it. Jurisdiction does not depend upon the fact that the defendant denies the existence of the claim made, or its amount or validity. If it were otherwise, then the circuit court would have no jurisdiction if the defendant simply admitted his liability and the amount thereof as claimed, although not paying or satisfying the debt. This would involve the contention that the Federal Court might be without jurisdiction in many cases where, upon bill filed, it was taken *pro confesso,* or whenever a judgment was entered by default. These are propositions which, it seems

to us, need only to be stated to be condemned. The cases are numerous in which judgments have been entered by consent or default where the other requisites to the jurisdiction of the Federal Court existed. Hefner v. Northwestern Mut. L. Ins. Co., 123 U. S. 747-756, 31 L. Ed. 309-313, 8 Sup. Ct. Rep. 337; Pacific R. Co. v. Ketcham, 101 U. S. 289-296, 25 L. Ed. 932-935."

In the case of—

Swift & Company v. *United States,* 276 U. S. 311, Headnote 6 in the report of the case found in 72 Lawyers Edition, page 587, reads as follows:

"The objection that a consent decree entered in a government prosecution was a nullity because defendant had denied all guilt and the government has abandoned its charges of violation of law by failing to produce evidence, and that, therefore, no cause or controversy existed to support the decree, is not open on a motion to vacate."

The Court's opinion read in part as follows:

"It is contended that the Supreme Court lacked jurisdiction because there was no case or controversy within the meaninig of §2 of Article 3 of the Constitution. Compare Lord v. Veazie, 8 How. 251, 12 L. Ed. 1067; Little v. Bowers, 134 U. S. 547, 33 L. Ed. 1016, 10 Sup. Ct. Rep. 620; South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co., 145 U. S. 300, 36 L. Ed. 712, 12 Sup. Ct. Rep. 921; California v. San Pablo & T. R. Co., 149 U. S. 308, 37 L. Ed. 747, 13 Sup. Ct. Rep. 876. The defendants concede that there was

a case at the time when the Government filed its petition and the defendants their answers; but they insist that the controversy had ceased before the decree was entered. The argument is that, as the Government made no proof of acts to overcome the denials of the answers, and stipulated both that there need be no findings of fact and that the decree should not constitute or be considered an adjudication of guilt, it thereby abandoned all charges that the defendants had violated the law; and hence the decree was a nullity. The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated. Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 82, 46 L. Ed. 808, 815, 22 Sup. Ct. Rep. 585; Pierce v. Society of Sisters, 268 U. S. 510, 536, 69 L. Ed. 1070, 1078, 39 A. L. R. 468, 45 Sup. Ct. Rep. 571. Moreover, the objection is one which is not open on a motion to vacate. The Court had jurisdiction both of the general subject matter—enforcement of the Anti-Trust Act—and of the parties."

Quite pertinent to this discussion is a consideration of decisions relating to compliance with Equity Rule 27, substantially similar to old Rule No. 94, to which some of the decisions herein mentioned refer.

In—

Dickerman v. *Northern Trust Co.*, 176 U. S. 181,

it was said:

"A judgment against a corporation is not collusive in the legal sense, so as to prevent its non-

payment from constituting a default for which a mortgage debt may be declared due under a provision of the mortgage, merely because the action was undertaken for the purpose of creating such default, if it was brought for a debt that was due, and was properly conducted."

Cotting, Et Al., v. *Godard, Attorney General of Kansas, and Kansas City Stock Yards Company*, 183 U. S. 79.

This was a suit by Cotting and others, stockholders in the defendant, Kansas City Stock Yards Company, against said company and the Attorney General of the State of Kansas, to restrain the enforcement of a statute of the State of Kansas attempting to regulate the operation of public stock yards in that State and charges to be made in the business. The point was made that the action could not be maintained by the stockholders against the company because the defendant, Kansas City Stock Yards Company, was equally desirous, as were the plaintiffs, that the statute in question be held invalid.

Discussing this contention and dismissing it as without merit, Mr. Justice Brewer, delivering the unanimous opinion of the Court, said:

"There yet remains a question of jurisdiction. The two suits which were consolidated were each brought by a stockholder in behalf of himself and all other stockholders against the corporation, its officers, and also the attorney general of the state of Kansas. The object of the suits was to restrain the attorney general from putting in force the

statute, and the defendants from reducing the funds of the corporation, and therefore the dividends to the stockholders, by yielding compliance to the mandates of the statute, and failing to charge reasonable rates.

"Of the jurisdiction of the court over the consolidated suit as one involving a controversy between the stockholders and the corporation and its officers, no serious question is made. Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401; Hawes v. Oakland, 104 U. S. 450, sub. nom. Hawes v. Contra Costa Water Co., 26 L. Ed. 827; Pollock v. Farmers' Loan & T. Co., 157 U. S. 429, 39 L. Ed. 759, 15 Sup. Ct. Rep. 673; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418, seem conclusive on the question. There is no force in the suggestion that the officers of the corporation agreed with the stockholders as to the unconstitutionality of the statute, and that therefore the suit is a collusive one. That was the condition in Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401, and it only emphasizes the fact that the officers were refusing to protect the interests of the stockholders, not wantonly, it is true, but from prudential reasons."

Keeping in mind that jurisdiction in this case is based not upon diversity of citizenship, but upon the fact that it involves a question arising under the Constitution of the United States, we call attention to the case of—

Ball v. *Rutland R. Co.*, 93 Fed. 513.

The question there raised will appear in this brief extract from the opinion of the Court, found on page 515:

> "Question is made whether the bill sufficiently sets forth either the efforts of the plaintiffs to procure refusal to issue and sell the mileage books, or that the suit is not a collusive one to give this court jurisdiction, according to Hawes v. Oakland, 104 U. S. 450, and equity rule 94. That a stockholder has a remedy in equity against directors to prevent violations of charter rights or breaches of trust to the reduction of profits, and that it may be sought in the courts of the United States in cases of proper citizenship or foundation appears to have been settled in Dodge v. Woolsey, 18 How. 331. Hawes v. Oakland pointed out what would be necessary for maintaining such a bill, and rule 94 followed it to prevent collusive suits by non-resident stockholders in federal courts. Although the orators are non-residents, this suit arises upon the constitution of the United States, *and this court has jurisdiction of it without reference to citizenship, and allegations of want of collusion in procuring suit to be brought on adverse citizenship would be immaterial. Smyth* v. *Ames*, 169 U. S. 466, 18 Sup. Ct. 418." (Italics ours.).

To the same effect is the case of—

Kimball v. *City of Cedar Rapids*, 99 Fed. 130.

This case further parallels the one at bar in that the very contention is there made that was raised in the Government's brief in the District Court, in this case,

to-wit: that proceedings there were instituted by a stockholder in the defendant company to protect rights properly belonging to the defendant company in its corporate capacity and that it appears that the company had already brought an action (in that instance in the State Court) to restrain the enforcement of the ordinance therein involved just as a statute is here involved. We quote from the Court's discussion of this point (page 131):

> "The defendants named in the bill are the city of Cedar Rapids, the mayor, alderman, and recorder of the city, and the waterworks company. As the bill is framed for the purpose of invoking the protection of the provisions of the federal constitution, and as the matter involved exceeds $2,000 in amount, the case is one which falls within the jurisdiction of this court, irrespective of the citizenship of the parties in interest; but it is strongly urged on behalf of the city and its officials that this court ought not to take jurisdiction of the bill as framed, because the proceedings are instituted by a stockholder of the waterworks company to protect rights properly belonging to the company in its corporate capacity; that it appears that the company has already brought an action in the district court of Iowa for Linn County to restrain the enforcement of the ordinance; and that complainant has not complied with the requirements of equity rule 94, and therefore the bill should be dismissed. The purposes for which this rule was promulgated by the supreme court are clearly set forth in Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827, it being therein stated that the

> rule is aimed at two evils—one being the effort to invoke federal jurisdiction wrongly by using the name of a stockholder in cases wherein, if the suit was brought in the name of the corporation, jurisdiction in the federal tribunal would not exist; and the other to prevent a minority of the stockholders from controlling and dictating the action of the corporation in matters properly within the control of the directors as the representative of the whole body of the stockholders. In the case now before the court, as already stated, it is one within federal cognizance, irrespective of the citizenship of the parties, and therefore the provisions of rule 94 cannot be invoked on the ground that the suit is in the name of a stockholder, in order to confer jurisdiction on this court, which would not exist if the suit had been brought by the waterworks company."

While it is true in that case the City of Cedar Rapids was made a party defendant as well as the waterworks company, and while it is likewise true that in that case the Court said that

> "in determining whether the actual controversy between the parties is one of which the court will assume jurisdiction, the court may arrange the parties as plaintiffs or defendants, according to their actual interest in the subject-matter of the suit, having the right to disregard the position assigned to them by the pleader (citing Harter v. Kernochan, 103 U. S. 562, 26 L. Ed. 411)."

it is equally true in the case at bar that the plaintiff, contending for the constitutionality of the Bituminous

Coal Conservation Act, has invited the Government to full participation in the case, so far as its only interest therein is concerned, to aid in upholding the constitutionality of that Act.

In the case of

> *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.,* 15 Fed. (2d) 509 (6th Cir.),

the plaintiff, Brown & Yellow Taxicab & Transfer Company dissolved its Kentucky corporation and reincorporated in Tennessee

> "for protection in this controversy or any controversy that may arise out of this or any contracts."

It thereupon brought suit against the L. & N. Railroad and against a competing Taxicab Company to compel the L. & N. Railroad Company to give full recognition to a contract which it had made with the plaintiff Taxicab Company giving it exclusive rights as a taxicab company and baggage transfer company at the station of the defendant railroad company in Bowling Green, Kentucky, and to further enjoin the Black & White Taxicab Company, its competitor, from interfering with plaintiff in the exercise of its rights claimed under such exclusive contract. It was perfectly apparent from a reading of the proof in the case that the L. & N. Railroad Company, defendant, was sympathetic with the cause of the plaintiff, so much so that when the District Court granted the injunction it declined to appeal. The defendant and

appellant, Black & White Taxicab Company, charged that the suit was collusive and further, that the plaintiff was guilty of a fraud on the jurisdiction of the Court.

This case was affirmed in

Black & White Taxicab & Transfer Company v. *Brown & Yellow Taxicab & Transfer Company,* 276 U. S. 518.

In reviewing the decision of the lower court, this Court, through Mr. Justice Butler, said in part as follows:

> "1. Section 37 of the Judicial Code requires any suit commenced in a district court to be dismissed, if it shall appear that the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction or that the parties have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable in such court. The requisite diversity of citizenship exists. And the controversy is real and substantial. The privilege granted is valuable. Petitioner treats the contract as invalid and claims to be entitled, without the consent of the railroad company, to use railroad property to park its vehicles and solicit business. The railroad company has failed to protect the rights it granted. The motives which induced the creation of respondent to become successor to its Kentucky grantor and take a transfer of its property have no influence on the validity of the transactions which are the subject of the suit. The succession and transfer were actual, not feigned or merely

colorable. In these circumstances, courts will not inquire into motives when deciding concerning their jurisdiction. M'Donald v. Smalley, 1 Pet. 620, 624; 7 L. Ed. 287, 289. It is enough that respondent is the real party in interest. Smith v. Kernochen, 7 How. 198, 216, 12 L. Ed. 666, 673. The incorporation of respondent or its title to the business and contract in question is not impeached. Co-operation between it and the railroad company to have the rights of the parties determined by a Federal Court was not improper or collusive within the meaning of §37. *Re* Metropolitan R. Receivership (*Re* Reisenberg), 208 U. S. 90, 110, 52 L. Ed. 403, 412, 28 Sup. Ct. Rep. 219; Harkin v. Brundage, 276 U. S. 36, *ante,* 457, 48 Sup. Ct. Rep. 268; South Dakota v. North Carolina, 192 U. S. 286, 311, 48 L. Ed. 448, 457, 24 Sup. Ct. Rep. 269. It requires no discussion to distinguish Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 40 L. Ed. 444, 16 Sup. Ct. Rep. 307, and Miller & Lux v. East Side Canal & Irrig. Co., 211 U. S. 293, 53 L. Ed. 189, 29 Sup. Ct. Rep. 111. The district court had jurisdiction."

In the case of—

Hill v. *Wallace,* 259 U. S. 44, 66 L. Ed. 822,

the Court gave consideration to the fact that the defendant, Chicago Board of Trade, was sympathetic with the plaintiff's cause of action. As indicating the nature of the points made in this action we here copy Nos. 1 and 3 of the headnotes in the Lawyers Edition:

"1. Assuming the Future Trading Act of August 24, 1921, to be invalid, sufficient equitable grounds to justify the relief sought by certain members of the Chicago Board of Trade against such Board of Trade, its president and directors, are stated in a bill to enjoin such defendants from complying with the act, where it is averred that the board of directors refused complainants' request to bring suit to have the act declared unconstitutional, not because they thought the act was valid, but because they feared to antagonize the public officials whose duty it was to construe and enforce it, and it is shown that the act, if enforced, will seriously injure the value of the Board of Trade to its members, and the pecuniary value of their memberships.

* * * * * * *

"3. The right to sue for an injunction against the taxing officials is not necessary to confer jurisdiction on the Federal Supreme Court of an appeal in a suit by members of the Chicago Board of Trade, challenging the validity of the Future Trading Act of August 24, 1921, where, if such officials were to be dismissed under U. S. Rev. Stat., §3224, the bill would still raise the mooted question against the defendants, the Board of Trade, its president, and its directors, and the Solicitor General has appeared on behalf of the Government, and argued the cause in full on all of the issues."

The case at bar is indeed a stronger one for the jurisdiction of the Court than even Hill v. Wallace, in that here it cannot be said that defendants are sympathetic with the plaintiff's cause of action, but

strongly contend that the Act which plaintiff seeks to have them obey is unconstitutional. That these questions were considered in deciding the case is emphasized by the concurring opinion of Mr. Justice Brandeis who, while agreeing that the Future Trading Act therein involved is unconstitutional, questions the right of the plaintiff to bring the action. However, he appears to have been alone in this view.

In—

Simpson v. *Union Stock Yards Company,* 110 Fed. 799,

we quote the first headnote as follows:

> "1. Jurisdiction of Federal Courts—Stockholder's Suit—Collusion. A nonresident stockholder in a domestic corporation, who brings himself within equity rule 94 by showing demand on the corporation to refuse compliance with a state statute, and to contest its validity, and a formal refusal of the corporation by resolution of its board of directors, cannot be charged with being in collusion with the corporation to give a federal court jurisdiction of a suit brought to enjoin the enforcement of the statute, and compliance therewith by the corporation, where, among the principal grounds alleged against the validity of the statute, is that it is in violation of the constitution of the United States; such allegations raising a federal question, which gives the court jurisdiction of the suit, and to determine all the issues made therein, regardless of the citizenship of the parties, and whether brought by the stockholders or the corporation itself."

We quote the following from the annotations appearing in the *United States Code Annotated,* Title 28, issued by West Publishing Company and Edward Thompson Company, in the volume containing the Equity Rules, which annotation appears in the second column of page 107:

> "In Lindsley v. Natural Carbonic Gas Co. (C. C. N. Y. 1908), 162 F. 954, wherein its is held that a stockholders' suit is not subject to the requirements of the rule, where it involves a constitutional question which gives the court jurisdiction, regardless of the citizenship of the parties and complainant and the corporation and its directors are evidently united in interest, the court said: 'It is objected, in the first place, that the complainant cannot assert his rights as a stockholder because of his failure to comply with the ninety-fourth rule in equity. Inasmuch as the jurisdiction of the court depends not only upon diversity of citizenship, but upon constitutional grounds, the rule is not applicable. It was enacted to prevent collusive actions in the federal courts by nonresident stockholders on the ground of diversity of citizenship, and also to prevent stockholders from asserting rights of a corporation which should be asserted by its directors. In this case the court has jurisdiction because of the constitutional questions raised, and it is quite evident that the gas company and its directors must be in entire sympathy with the bill. Kimball v. City of Cedar Rapids (C. C. Iowa, 1900), 99 F. 130."

GOVERNMENT'S BRIEF AS "AMICUS CURIAE" IN DISTRICT COURT.

The brief Amicus Curiae filed in the District Court by counsel for the United States Government lists a number of cases as being in conflict with the foregoing. In citing these cases, their brief said:

> "It is settled under the Constitution the jurisdiction of the Federal Courts is limited to cases or controversies."

With this statement we have no quarrel, but none of the cases cited in support of this proposition has the slightest bearing in a case such as that at bar, nor in anywise offsets the effect of the decisions we have cited or from which we have given quotations. The cases cited by the Government in which the Courts held they could not exercise their judicial functions may be classified generally as cases in which the plaintiffs sought to have the Court pass upon a mere abstract proposition of law having no present application to any controversy alleged to exist between the plaintiff and the defendant in such action, except the bare controversy as to whether or not the questioned Act was constitutional. In none of these cases in which the Court thus declined jurisdiction was there any controversy between the parties based either upon an attempted or a threatened application of the Act whose constitutionality the plaintiff sought to have investigated.

We will give a brief statement of the alleged controversy in each instance.

Muskrat v. *United States*,
219 U. S. 346.

An Act of Congress undertook to confer jurisdiction upon the Court of Claims and, on appeal, upon the Supreme Court, to determine the validity of certain Acts of Congress referred to in the Act. Plaintiff brought a suit under the provisions of that Act, the sole relief sought being to have declared unconstitutional the Act of Congress referred to in the Enabling Act. The Court said in part:

> "By cases and controversies are intended the claims of litigants brought before the Courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights or prevention, redress or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States take such a form that the judicial power is capable of acting upon it, then it has become a case."

The Court held it had no jurisdiction to render a decision, saying with reference to the litigation in question:

> "The object is not to assert a property right as against the Government or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class

> of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. * * * In a legal sense the judgment could not be executed and it amounts in fact to no more than an expression of opinion upon the validity of the Acts in question."

This is quite different from the case at bar, in which rights in dispute between the parties litigant turn upon the constitutionality or unconstitutionality of the Bituminous Coal Act. Upon finding, as plaintiff contended, that the Act in question is constitutional, the Court did more than merely express that view in a written opinion, but, following up the expression of that view, entered a judgment granting injunctive relief to the plaintiff. The Muskrat case is clearly not in point.

Texas v. *Interstate Commerce Commission,*
258 U. S. 158, 66 L. Ed. 531.

This case may best be distinguished from that at bar by merely copying herein the second headnote in the Lawyer's Edition, which reads as follows:

> "Courts—jurisdiction—abstract constitutional questions.
>
> "2. So much of the bill filed in a suit by a state against the Interstate Commerce Commission and the railroad labor board as raises the ab-

stract question as to whether the matters dealt with in several of the provisions of the Transportation Act of February 28, 1920, titles 3 and 4, fall within the field wherein Congress may speak with constitutional authority or within the field reserved to the several states, does not present a case or controversy within the range of the judicial power as defined by the Federal Constitution. It is only where rights in themselves appropriate subjects of judicial cognizance are being, or are about to be, affected prejudicially by the application or the enforcement of a statute, that its validity may be called in question by a suitor, and determined by an exertion of the judicial power."

Massachusetts v. *Mellon*,
262 U. S. 447.

This was an attempt by the State of Massachusetts, in a purely abstract suit, to test the constitutionality of an Act of Congress generally known as the Maternity Act. Quotations from the headnotes in Lawyers Edition will again suffice to show the distinction between that case and the one at bar. These headnotes read as follows:

"Supreme Court of the United States—jurisdiction—state a party to suit.

"2. The Supreme Court of the United States has no jurisdiction of a suit by a state to enjoin the enforcement of an act of Congress which is to become operative in any state only upon acceptance by it, on the ground that it is an attempt by Congress to legislate outside its powers and within the powers exclusively reserved to the states, al-

though it is alleged that the purpose was to induce the states to yield a portion of their sovereign rights, and that the burden of appropriations will fall unequally upon the several states, since the question is political, and not judicial, in character.

"3. A state cannot, as *parens patriae,* institute judicial proceedings to protect citizens of the United States who are also its citizens from the operation of statutes of the United States."

* * * * * * * *

"5. The question of the constitutionality of an Act of Congress may be considered by the Supreme Court of the United States only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon it.

"6. One who invokes the power of the court to declare an act of Congress to be unconstitutional must be able to show not only that the statute is invalid, but that he has sustained, or is in immediate danger of sustaining, some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

"7. The Supreme Court of the United States has no jurisdiction to enjoin the enforcement of an Act of Congress by government officials which will not affect the rights of the complainant in such manner as to raise a judicial controversy."

New Jersey v. *Sargent*,
269 U. S. 328.

The opinion reads in part:

"This is a bill in equity brought in this court by the state of New Jersey against the Attorney General of the United States and the members of the Federal Power Commission, all alleged to be citizens of other states, to obtain a judicial declaration that certain parts of the Act of June 10, 1920, called the Federal Water Power Act, Chap. 285, 41 Stat. at L. 1063, Comp. Stat., §9992¼, Fed. Stat. Anno. Supp. 1920, p. 367, are unconstitutional in so far as they relate to waters within or bordering on that state, and to enjoin the defendants from taking any steps towards applying or enforcing them in respect of those waters. The defendants respond with a motion to dismiss on the ground, among others, that the bill does not present a case or controversy appropriate for the exertion of judicial power but only an abstract question respecting the relative authority of Congress and the state in dealing with such waters. If this be a proper characterization of the bill the motion to dismiss must prevail, as a reference to prior decisions will show.

"In Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721, this court had before it a bill by the state of Georgia challenging the power of Congress to enact the so-called Reconstruction Acts and seeking an injunction against the Secretary of War and others to prevent them from giving effect to that legislation. On examining the bill the court found that it was directed against an alleged encroachment by Congress on political rights of the state

and not against any actual or threatened infringement of rights of persons or property; and on that ground the bill was dismissed. The nature and extent of the judicial power under the Constitution were much considered; the statement of Mr. Justice Thompson in Cherokee Nation v. Georgia, 5 Pet. 75, 8 L. ed. 52: 'It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here.

* * * * * * * *

" 'But, according to the course of proceeding under this head in equity, in order to entitle the party to a remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.' "

Upon the basis that there was no showing that the plaintiff State was engaged in, or about to engage in, any work or operations which the Act purports to prohibit or restrict, or that the defendants were interfering, or about to interfere, with any work or operations in which the State was engaged, and upon the familiar principles referred to in the other cases cited by the

Government, the Supreme Court refused to take jurisdiction of the question.

Liberty Warehouse Company, etc., v. *Grannis*, 273 U. S. 70.

In this case the plaintiff warehouse company filed suit against the defendant, a commonwealth attorney of one of the judicial districts of the State of Kentucky, seeking to obtain a declaration of the rights and duties of the plaintiff under an Act of the Kentucky Legislature regulating the sales of leaf tobacco at public auction, alleging that this Act was invalid and repugnant to the Bill of Rights and Constitution of the United States, the commerce clause of the Constitution of the United States, and the due process and equal protection clauses of the 14th Amendment, and the Sherman Anti-Trust Law, and that an actual controversy existed with respect thereto. There was no allegation in the petition that the Commonwealth's Attorney was proposing or threatening in anywise to invoke against the plaintiff the penalties of this Act. We quote from the opinion as follows:

> "The sole purpose of the petition, as shown by its express allegations, is to obtain a declaration from the District Court of the rights and duties of the plaintiffs under the Act of 1924, and a determination of the extent to which they must comply with its provisions in the conduct of their business. This is its entire scope. While the Commonwealth Attorney is made a defendant as a representative of the Commonwealth, there is no

> semblance of any adverse litigation with him individually; there being neither any allegation that the plaintiffs have done or contemplate doing any of the things forbidden by the Act before being advised by the court as to their rights, nor any allegation that the Commonwealth Attorney has threatened to take or contemplates taking any action against them for any violation of the Act, either past or prospective. And no relief of any kind is prayed against him, by restraining action on his part or otherwise.
>
> "The question whether the District Court has jurisdiction to entertain such a petition for a declaration of rights admits of but one answer under the prior decisions of this Court."

The answer is that in such a case the Federal Court has no jurisdiction.

A very recent decision is that of

United States v. *State of West Virginia*, 295 U. S. 463.

This was an original suit brought in the Supreme Court of the United States

> "in which relief by injunction is sought against the defendants, the State of West Virginia, Union Carbide & Carbon Corporation, a New York corporation, and its wholly owned subsidiaries, Electro Metallurgical Company and New-Kanawha Power Company, West Virginia corporations."

Separate motions were made by all of the defendants, including the State of West Virginia, to dismiss the

bill of complaint on the ground that it did not state any judicial controversy between the United States and the State of West Virginia, and that it appeared upon the face of the bill of complaint that the Supreme Court had no original jurisdiction of the suit against the defendants, or any of them. The bill discloses that the State of West Virginia had taken no action and had threatened no action of any kind entitling the United States to injunctive relief, and the case in effect was merely one for the declaration of the rights of the United States, which were not questioned by any action of the State of West Virginia. Since the sole ground of original jurisdiction in the Supreme Court was that it was an action against a sovereign State, the Court dismissed the bill. We quote briefly from the opinion:

> "General allegations that the State challenges the claim of the United States that the rivers are navigable, and asserts a right superior to that of the United States to license their use for power production, raise an issue too vague and ill-defined to admit of a judicial determination. They afford no basis for an injunction perpetually restraining the State from asserting any interest superior or adverse to that of the United States in any dam on the rivers, or in hydro-electric plants in connection with them, or in the production and sale of hydro-electric power. The bill fails to disclose any existing controversy within the range of judicial power. See New Jersey v. Sargent, *supra*, 339, 340."

Willing v. *Chicago Auditorium*, 277 U. S. 274.

The Chicago Auditorium Company was the lessee for a long term of years of valuable ground in the City of Chicago, upon which it had erected costly improvements. The building proved unprofitable to the stockholders of the corporation that had erected it. Willing, the defendant appellant, was one of a number of lessors of the ground upon which the building was erected. The lease provided for the maintenance of a building upon the leased ground. The lessee desired to tear down the improvements and to erect others of equal or greater value but more suitable to the needs of the neighborhood. Because of certain provisions in the lease the lessee feared that by tearing down the building it might incur a forfeiture of its lease. The lessors merely stood silent. Being thus uncertain whether or not by tearing down the improvements it would incur a forfeiture of the lease, the Auditorium Company brought a suit against the lessors in the State courts of Illinois in the nature of a declaratory judgment suit to have determined in advance what would be lessors' and lessee's rights in the event the lessee did tear down the building. Declaratory judgment suits are authorized under Illinois law. Certain of the defendants, upon grounds of diversity of citizenship and that there was a separable controversy as to owners of separate parts of the leased ground, had the cause removed to the Federal Court of the district. It was there tried and determined, despite the contention of the defendants that

> "the bill was not within the jurisdiction of a court of equity and that the court is without jurisdiction of the subject-matter of the case made, or attempted to be made, by the bill."

At first the District Court differed with these contentions and tried the case. However, the District Court, evidently changing its opinion after a full hearing of the facts, dismissed the bill

> "for want of equity jurisdiction in the Court to grant any relief upon the pleadings and evidence, but without prejudice to whatever rights the plaintiff may have * * * when asserted in any appropriate proceeding or otherwise (8 Fed. (2d) 998)."

The Circuit Court of Appeals, differing with this view, held

> "that the suit was cognizable in a court of equity as one to remove a cloud upon title; and it reversed the decree with directions to the district court to hear the evidence and determine the issues involved (20 Fed. (2d) 837)."

Reversing the Circuit Court of Appeals, the Supreme Court held that there was no provision in the Federal Judicial Code for the trial of a declaratory judgment suit. The opinion reads in part as follows:

> "There is not in the bill, or in the evidence, even a suggestion that any of the defendants had ever done anything which hampered the full enjoyment of the present use and occupancy of the demised premises authorized by the leases. There

was neither hostile act nor a threat. There is no evidence of a claim of any kind made by any defendant, except the expression by Willing, in an amicable, private conversation of an opinion on a question of law. Then, he merely declined orally to concur in the opinion of the association that it has the right asserted. For that, or for some other reason, several of the defendants had refused to further the association's project. Other defendants had neither done nor said anything about the matter to anyone, so far as appears. Indeed, several refrained, even in their answers, from expressing any opinion as to the legal rights of the parties. Obviously, mere refusal by a landlord to agree with a tenant as to the meaning and effect of a lease, his mere failure to remove obstacles to the fulfillment of the tenant's desires, is not an actionable wrong, either at law or in equity. And the case lacks elements essential to the maintenance in a Federal Court of a bill to remove a cloud upon title. The alleged doubt as to plaintiff's right under the leases arises on the face of the instruments by which the plaintiff derives title. Because of that fact, the doubt is not in legal contemplation a cloud, and the bill to remove it as such does not lie. It is true that the plight of which the association complains cannot be remedied by an action at law. But it does not follow that the association may have relief in equity in a Federal Court. What the plaintiff seeks is simply a declaratory judgment. To grant that relief is beyond the power conferred upon the Federal judiciary."

While the Court holds that the case is not a moot case like Singer Manufacturing Company v. Wright, 141 U. S. 696, 35 L. Ed. 906, and a number of other cases cited; that unlike certain other cases cited in the opinion the matter is not an administrative question, but that

> "the bill presents a case, which if it were the subject of judicial cognizance, would in form come under a familiar head of equity jurisdiction,"

and that a final judgment might be given and that the parties are adverse in interest; that there is no lack of substantial interest to the plaintiff in question which it seeks to have adjudicated, but that unlike the case of New Jersey v. Sargent, already cited in this brief, the alleged interest of the plaintiff is distinct and specific and there is no attempt to secure an abstract determination by the Court of the validity of the statute, as there was in Muskrat v. United States, already cited in this brief. Despite all this, says the Supreme Court:

> "The proceeding is not a case or controversy within the meaning of Article 3 of the Constitution. The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others, does not confer a cause of action. *No defendant has wronged the plaintiff or has threatened to do so.* Resort to equity to remove such doubts is a proceeding which was unknown to either English or American Courts at the time of the adoption of the Constitution and for more than half a century thereafter. (Citing cases.)

> "As the proceeding is not a suit within the meaning of Section 28 of the Judicial Code, the motions to remand the cause to the State Court should have been granted. (Citing cases.) Whether, as the respondent contends, it has a remedy under the law of Illinois, we have no occasion to consider. (Citing cases.) Even a statute of the State could not confer a remedial right to proceed in equity in a Federal Court in a suit of this character."

It will be seen, as stated in a portion of the opinion, that this decision is based upon the fact that the defendants had done nothing to hamper the plaintiff in the future enjoyment of the demised premises and that there was neither a "hostile act nor a threat," and that there was

> "no evidence of a claim of any kind made by the defendant, except the expression by Willing in an amicable, private conversation, of an opinion on a question of law."

Certainly this differs widely from the action taken by the defendant, Tway Coal Company, and its co-defendants, the majority of the Board of Directors of that Company, in determining not to accept the provisions of the Guffey Coal Conservation Act, but to operate outside its provisions. In the case at bar, the plaintiff alleges that this threatened action will, if the Guffey Coal Conservation Act is constitutional, cause irreparable injury to him and to his interests in the Coal Company. That this injury would follow if the Act were constitutional, defendants do not deny.

They assert, however, that the Act is unconstitutional and we have here a real controversy as to a question of law and an injury certain to follow from an action not merely threatened, but already taken.

As a matter of interest, we call the Court's attention to the concurring opinion of Mr. Justice Stone in the Auditorium case, in which while agreeing

> "that the suit is plainly not one within the equity jurisdiction conferred by Sections 24, 28 of the Judicial Code"

he states

> "But it is unnecessary and I am therefore not prepared to go further and say anything in support of the view that Congress may not constitutionally confer on the Federal Courts jurisdiction to render declaratory judgments in cases where that form of judgment would be an appropriate remedy or that this Court is without constitutional power to review such judgments of State Courts when they involve a Federal question."

Since that opinion the Congress has adopted an amendment to the Judicial Code which authorizes declaratory judgment suits.

These decisions, we feel, leave no doubt that the District Court had jurisdiction of this action, in view of the constitutional question presented and the threatened injury to the plaintiff's rights.

2. The Action Has Not Been Brought Prematurely.

The companion cases of—

Commonwealth of Pennsylvania, Complainant, v. *State of West Virginia,* and
State of Ohio v. *State of West Virginia,* 262 U. S. 553,

were original actions filed in the Supreme Court. The Commonwealth of Pennsylvania and the State of Ohio sought to restrain the enforcement of a statute of the State of West Virginia requiring natural gas producing companies to supply domestic demands to the extent of their supply, the effect of which would have been to interfere with the supply to certain of the complainants' institutions. This was held to present a justiciable controversy between States within the provisions of the Federal Constitution conferring original jurisdiction upon the Supreme Court of the United States. Among the questions bearing on the propriety of entertaining the suits raised by the defendant and considered by the Supreme Court was that discussed in the opinion upon the second question, being, whether or not the suit was prematurely brought in view of the fact that no attempt had as yet been made to put it into effect. The Supreme Court held the point not to be well taken. Mr. Justice Van Devanter delivered the opinion of the Court and expressed its view on this point as follows:

> "The second question is whether the suits were brought prematurely. They were brought a few days after the West Virginia act went into force.

No order under it had been made by the Public Service Commission, nor had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so if it otherwise appeared that the act certainly would operate as the complainant states apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If injury is certainly impending that is enough."

In the companion cases of

Walter M. Pearce, as Governor of the State of Oregon, Et Al., v. *Society of the Sisters of the Holy Names of Jesus and Mary*, and of
Walter M. Pearce, as Governor of the State of Oregon, Et Al., v. *Hill Military Academy*, 268 U. S. 510,

involving the constitutionality of a statute of the State of Oregon requiring all children between the ages of eight and sixteen years to attend the public schools, the question was raised as to whether or not the suit, having been filed long before the effective date of the Act, was prematurely brought. On this subject, Mr. Justice McReynolds, delivering the unanimous opinion of the Court, said:

"The suits are not premature. The injury to appellees was present and very real,—not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity."

The case of

City Bank Farmers Trust Company, Executor, v. *William A. Schnader, Attorney General of Pennsylvania, Et Al.,* 291 U. S. 24,

involved the validity under the Federal Constitution of the application to the property of a non-resident of Pennsylvania of an inheritance tax sought to be imposed under the statutes of that Commonwealth. The plaintiff sought, in the District Court of the United States for the Eastern District of Pennsylvania, to enjoin the attempted imposition and collection of the tax. The District Court declined to grant the injunction, but on appeal to the Supreme Court this action was reversed.

With reference to the question raised whether the suit was prematurely filed, the Supreme Court, speaking through Mr. Justice Roberts, said:

> "3. The question then is whether the bill was prematurely filed. In view of what has been said the appellant's cause of action in equity will not, strictly speaking, arise until an appraisement is made and certified to the Department of Revenue and notice of the fact is given appellant. However, in view of the allegations of the bill, we are not inclined to hold the suit premature. The bill charges that the Secretary of Revenue has refused to issue a waiver of tax, and that the Attorney General has notified the appellant and the State's appraiser the property is subject to the tax, and the appellant's claim for exemption will be denied. The Commonwealth's law officers plainly intend to perform what they consider their duty, and will,

unless restrained, cause the assessment and imposition of the tax. The action the legality of which is challenged thus appears sufficiently imminent and certain to justify the intervention of a court of equity. Compare Pennsylvania v. West Virginia, 262 U. S. 553, 592, 67 L. Ed. 1117, 1130, 43 S. Ct. 658, 32 A. L. R. 300. Moreover, no purpose would be served by dismissing the bill, if, as we hold, the moment the proposed assessment is made another suit may be instituted in the Federal Court."

Counsel for respondent contends that under the decisions of this Court and of other Federal Courts herein cited, it has been shown that in the case at bar,

(a) A justiciable controversy exists between the respondent, plaintiff in the District Court, and the petitioner, defendant therein;

(b) There is no collusion between the parties within the meaning of the Judicial Code; and

(c) Respondent's action in the District Court was not prematurely brought.

For these reasons counsel contends that this case properly presents to the Court for determination the issue as to whether the Bituminous Coal Conservation Act is constitutional or unconstitutional, and, should it be held to be constitutional, a proper case for the granting of the injunctive relief which the respondent sought in the District Court.

As counsel has already stated, knowing that counsel for the United States Government will in this, or in its companion cases, fully and ably present the argument

that the Act in question is constitutional, we have felt it unnecessary to supplement their efforts by anything we might say herein.

Respectfully submitted,

JOSEPH SELLIGMAN,
Louisville, Kentucky,
Counsel for Respondent.

SELLIGMAN, GOLDSMITH, EVERHART & GREENEBAUM,
Marion E. Taylor Building,
Louisville, Kentucky,
Of Counsel.

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